

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	
)	
v.)	NO. 2:04-CR-26 PS
)	
MICHAEL D. SHELBY)	
)	
Defendant.)	

OPINION AND ORDER

Defendant Shelby filed a Notice of Appeal [Doc. 93] on August 7, 2006. Defendant also included a Motion to Proceed In Forma Pauperis [Doc. 94] and a Motion to Appoint Counsel [Doc. 95] within his Notice.

As the Court has told him numerous times, he is not permitted to appeal his conviction [Doc. 81, 84, 92]. To reiterate, he is too late. Defendant had ten days to appeal his judgment, Fed. R. App. P. 4(b)(1)(A), with an extension of an additional thirty days upon a finding of excusable neglect or good cause, *id.* at 4(b)(4). Defendant's trial counsel, Nishay Sanan, did not file a notice of appeal regarding Defendant's conviction and/or sentencing within that 40-day period.¹ Even if Sanan's failure to file a timely notice of appeal constitutes ineffective assistance of counsel, this Court still is not permitted to extend the time in which Defendant may file a

¹ The Court entered Defendant's judgment on August 11, 2005. His ten days to file his notice of appeal expired on August 25, 2005. His additional thirty days for good cause or excusable neglect ended on September 26, 2005. Defendant's initial inquiry to this Court regarding whether his counsel had filed a notice of appeal [Doc. 79] was on September 29, 2005 (the date marked on the letter and apparently sent to this Court) – three days after the 40-day period had elapsed.

notice. *See* Fed. R. App. P. 4(b)(4) (“[T]he district court may . . . extend the time to file a notice of appeal for a period **not** to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).”) (emphasis added); Fed. R. App. P. 26(b)(1) (“[T]he court may **not** extend the time to file a notice of appeal (except as authorized in Rule 4[.]”) (emphasis added); *see also* *United States v. Hirsch*, 207 F.3d 928, 930 (7th Cir. 2000) (noting that “Rule 26(b)(1) adds that a district court lacks power to extend the time for a notice of appeal, except to the extent provided in Rule 4.”).

Defendant has filed a 28 U.S.C. § 2255 petition. *See Shelby v. United States*, Doc. 2:06-CV-279 (N.D. Ind. August 10, 2006). This is now Defendant’s only avenue to attack his judgment or sentencing; a direct appeal is unavailable to him.

Because he may not directly appeal this case, the Court **DENIES** Defendant’s Motion to Proceed In Forma Pauperis [Doc. 94]. Defendant may file a motion to proceed in forma pauperis for his 28 U.S.C. § 2255 petition, if he so chooses. Also for the above reasons, the Court **DENIES** Defendant’s Motion to Appoint Counsel [Doc. 95] for his appeal.

SO ORDERED.

ENTERED: October 3, 2006

s/ Philip P. Simon
PHILIP P. SIMON, JUDGE
UNITED STATES DISTRICT COURT